1   QUINN EMANUEL URQUHART & SULLIVAN, LLP
      Jennifer A. Kash (Bar No. 203679)
2   (jenniferkash@quinnemanuel.com)
      Sean Pak (Bar No. 219032)
3   (seanpak@quinnemanuel.com)
      Iman Lordgooei (Bar No. 251320)
4   (imanlordgooei@quinnemanuel.com)
      Sam Stake (Bar No. 257916)
5   (samstake@quinnemanuel.com)
    50 California Street, 22nd Floor
6   San Francisco, California 94111-4788
    Telephone: (415) 875-6600
7   Facsimile: (415) 875-6700

8   Attorneys for Defendants PROOFPOINT, INC.
    and ARMORIZE TECHNOLOGIES, INC.

9

10   UNITED STATES DISTRICT COURT

11   NORTHERN DISTRICT OF CALIFORNIA

12   SAN FRANCISCO DIVISION

13 FINJAN, INC.,   Case No. 3:13-CV-05808-HSG

14   Plaintiff,   **PROOFPOINT, INC. AND ARMORIZE
                                           TECHNOLOGIES, INC.'S NOTICE OF
15   vs.   MOTION AND RENEWED MOTION TO
                                           STRIKE FINJAN, INC.'S
16 PROOFPOINT, INC. AND ARMORIZE   INFRINGEMENT CONTENTIONS**
    TECHNOLOGIES, INC.,
17   **Date: July 9, 2015**
          Defendants.   **Time: 2:00 p.m.**
18   **Dep.:   Courtroom 15, 18th Floor**
                                           Judge: Hon. Haywood S. Gilliam
19
                                           PUBLIC REDACTED VERSION
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                                                          Case No. 3:13-CV-05808-HSG
    DEFENDANTS' RENEWED MOTION TO STRIKE INFRINGEMENT CONTENTIONS

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1

NOTICE OF MOTION

2

TO ALL PARTIES AND THEIR ATTORNEYS OF RECORD:

3   NOTICE IS HEREBY GIVEN that on July 9, 2015 at 2:00 p.m., or as soon thereafter as

4   counsel may be heard by the above-titled court, located at 450 Golden Gate Avenue, San Francisco,

5   CA 94102, Defendants Proofpoint, Inc. and Armorize Technologies, Inc. (collectively, "Proofpoint"

6   or "Defendants") will and hereby do move the Court for an Order striking the citations to Proofpoint's

7   source code directories from the amended infringement contentions served by Plaintiff Finjan, Inc.

8   ("Finjan"). This Motion is based on this Notice of Motion, the following Memorandum of Points and

9   Authorities, the Declaration of Sam Stake, filed herewith, the pleadings and papers on file herein, and

10   any evidence and argument presented to the Court at the hearing.

11

STATEMENT OF RELIEF SOUGHT

12   Proofpoint seeks an Order from the Court striking the source code citations from the amended

13   infringement contentions served by Plaintiff Finjan, Inc. ("Finjan") with prejudice, such that Finjan is

14   precluded from relying on source code evidence in support of its patent infringement allegations.

15

STATEMENT OF THE ISSUES

16   1.   Whether Finjan's citations to high-level source code directories in its amended

17   infringement contentions fail to meet the standards of specificity required by the Patent Local Rules

18   and the Court's Order, and should therefore be stricken with prejudice, such that Finjan is precluded

19   from relying on Defendants' source code in support of its allegations of patent infringement.

20   2.   Whether, in the alternative, Finjan should be precluded from relying on more detailed

21   citations to Defendants' source code in support of its patent infringement allegations.

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1   **MEMORANDUM OF POINTS AND AUTHORITIES**

2   **I.   INTRODUCTION**

3   Despite this Court's order compelling disclosure of infringement contentions, Finjan has once

4   again completely failed to provide infringement contentions that comply with the Northern District of

5   California's Patent Local Rules. Finjan initially served infringement contentions over one year ago

6   asserting infringement of over 120 claims across eight patents. As this Court held, those contentions

7   were wholly inadequate, improperly mixed unrelated products, failed to even discuss many of the

8   allegedly accused products, and relied on generic citations to evidence untethered from the claim

9   limitations. On April 2, 2015, the Court granted Defendants' motion to strike Finjan's contentions in

10   large part, finding that Finjan failed to provide a cognizable theory of infringement for any of the

11   asserted claims against any of the accused products.

12   Finjan has now served amended infringement contentions that dangle clues as to its

13   infringement theories, but still fail to put Defendants on notice of what actual components of the

14   accused instrumentalities are alleged to meet each asserted claim limitation. In particular, Finjan

15   relies on wholesale citations to dozens of high-level source code directories for nearly every limitation

16   of every asserted claim, failing to provide even one pinpoint citation to the code or any files or

17   functions in the code that allegedly practice any of the asserted claim limitations. Finjan has had

18   access to Proofpoint's source code since June 2014, and it was obligated to provide its theories as to

19   how this code meets each claim limitation. Yet Finjan failed to even inspect the code at any time

20   between the Court's hearing and the time Finjan served its infringement contentions. As a result,

21   Finjan's contentions do not comply with this Court's order.

22   Finjan's continued failure to put Defendants on notice of its infringement theories—despite

23   having access to source code for nearly one year—can only mean that Finjan is continuing to hide the

24   ball in this case in contravention of the Court order, or that it simply has no infringement theories to

25   move forward with. Accordingly, Proofpoint brings this Renewed Motion to Strike. Proofpoint asks

26   the Court to strike Finjan's generic citations to source code directories in their entirety or,

27   alternatively, to preclude Finjan from relying on more detailed source code citations to support its

28   allegations of infringement.

II.   STATEMENT OF FACTS

A.   Finjan Serves Deficient Infringement Contentions

Finjan served its initial infringement contentions on April 17, 2014. As the Court later held (*see* Dkt. No. 138), these contentions fell short of Patent Local Rule 3-1's requirements. Proofpoint notified Finjan of these deficiencies repeatedly, describing in detail why Finjan's infringement contentions did not meet the requirements set forth by this District's Patent Local Rules. *See* Dkt. No. 118 at 5 (detailing Proofpoint's correspondence with Finjan on the deficiencies in its contentions). Finjan, however, refused to take remedial measures. *See id*.

On June 9, 2014, Proofpoint made available a laptop with the relevant source code for the accused products to Finjan for inspection. Declaration of Sam Stake ("Stake Decl.") ¶ 34, Ex. J. Finjan waited over three months before inspecting the source code for the first time in October 2014. *Id*. ¶ 35, Ex. K. Between its initial inspections of source code in October and Finjan's service of its amended infringement contentions in April 2015, Finjan never returned to review the code. *Id*.

B.   Finjan Fails To Supplement Its Infringement Contentions or Interrogatory Responses With Source Code

Despite having source code available to it for months, and despite numerous specific requests from Proofpoint to disclose its theories of infringement, Finjan refused to supplement its infringement contentions.   Finjan   also   failed   to   supplement   interrogatory   responses   requesting   this   exact information. Proofpoint put the issue before Magistrate Judge Lloyd as a motion to compel Finjan's response to Proofpoint's interrogatory seeking infringement contentions. *See* Dkt. No. 115 at 1. The Magistrate ordered Finjan to "supplement its response to Defendants' Interrogatory No. 1 to disclose 'what in each accused instrumentality it contends practices each and every limitation of each asserted claim,' and to provide a comparison of each accused product to the asserted patents on a claim by claim, element by element basis." *Id*. at 6.

Contrary to that Order, Finjan provided Proofpoint with a supplemental interrogatory response providing no new information. Dkt. No. 118 at 6. Finjan instead copied and pasted its same deficient infringement contentions that had been found lacking. *Id*.   Finjan's repeated failure to disclose its theory of infringement led Proofpoint to file a motion to strike Finjan's infringement contentions.

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C.   Finjan Acknowledges to the Court That the Patents Require Citation to Specific Source Code

On March 19, 2015, the Court held a hearing on Proofpoint's motion to strike. The Court noted that "[t]he Local Rule is clear that the contention needs to identify within each accused instrumentality where the infringing limitation appears. And in looking at the – looking at the contentions, it does appear that there is sort of a very generalized use of screen shots and recitation of language for each." Stake Decl. ¶ 36, Ex. L at 3:2-4. Finjan responded that it initially did not provide more specific infringement contentions because it did not have access to the source code, "[a]nd a lot of these patents really go to – they're directed at what **specific rules, routines, source code, elements** that may be occurring in the back end." *Id.* at 4:2-4 (emphasis added). Finjan explained, however, that "once we have a chance to really get into all the other technical information, we can provide more." *Id.* at 4:12-14.

D.   The Court Orders Specific Infringement Contentions

Despite Finjan's representations and these statements by the Court, Finjan made no attempt following the hearing to investigate the source code that Proofpoint had first made available for inspection nine months earlier. On April 2, 2015, the Court issued a 21 page opinion explaining in detail the deficiencies in Finjan's contentions, and detailing the steps Finjan needed to take in order to provide compliant contentions. The Court recognized that a "core argument" in Proofpoint's motion to strike was Finjan's failure to include "sufficient detail to provide notice of its theory of infringement," explaining, "'At the Patent Local Rule 3-1 Disclosure stage, a plaintiff must put forth information so specific that either reverse engineering or its equivalent is required.'" Dkt. 138 at 10 (quoting *InterTrust Tech. Corp. v. Microsoft Corp.*, No. C 01-1640 SBA, 2003 WL 23120174, at *3 (N.D. Cal. Dec. 1, 2003). The Court found that Finjan's contentions did not comply with the Local Rules and, "troublingly, the little explanation Finjan does provide is framed in high-level generalities that do not specifically relate to the claim elements identified in each Claim." Dkt. No. 138 at 11 (citing Pat. L.R. 3-1(c)). The Court noted, "In order to satisfy Patent Local Rule 3-1(c) . . . Finjan was required to identify what structure, act, or material in each of the Armorize Products infringes each claim element." *Id.* at 11. The Court

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1   specifically took note of "Finjan's concessions at the March 19, 2015 hearing that it could have

2   taken steps to further clarify its infringement contentions," and ordered Finjan to provide amended

3   infringement contentions within 21 days. *Id.* at 16, 20. The Court further permitted Proofpoint to

4   renew its motion to strike within 21 days of service of those contentions if Finjan failed to remedy

5   the deficiencies. *Id.* at 20.

6   **E.   Finjan Fails to Comply with the Court's Order**

7   Following the issuance of the Court's order, Finjan made no further effort to review

8   Proofpoint's source code. On April 23, 2015, Finjan served amended contentions that failed to

9   identify specific source code, rules, routines, or back-end elements within Proofpoint's products

10   that allegedly meet the asserted claim limitations. Instead, Finjan simply listed, for every asserted

11   claim limitation, several dozen source code directories with no further explanation of how they

12   support its infringement theories. Below is a single, reduced-size example of such a citation that

13   spans three pages of Finjan's contentions for a single claim element.

25   Stake Decl. ¶ 6, Ex. A-3 at 21-23. Finjan fails to explain where each claim limitation is found

26   within this laundry list of directories. *Id.* For example, for claim element 1b of the '844 Patent

27   ("receiving by an inspector a Downloadable"), Finjan cites over two pages of high-level source

28   code directories allegedly meeting this limitation, yet Finjan only states: "Based on Finjan's

DEFENDANTS' RENEWED MOTION TO STRIKE INFRINGEMENT CONTENTIONS

1 *limited review* of the Defendants' source code, Finjan has determined that the source code located

2 at the following directories and subdirectories support infringement of this element[.]" *Id*. at 5-8

3 (emphasis added). Finjan repeats exactly this contention for *all* of the asserted claim limitations,

4 without identifying any specific portions of code (e.g., by function name, file name, line numbers,

5 etc.) that are allegedly responsible for practicing the asserted claim limitation.

6 After service of its amended contentions, Finjan again made no attempt to review

7 Proofpoint's source code. Only today, seven months after its previous inspection, and the last day

8 that Proofpoint could renew its motion to strike,[1] Finjan returned to inspect the source code.

9 **III. LEGAL STANDARD**

10 "The overriding principle of the Patent Local Rules is that they are designed to make the

11 parties more efficient, to streamline the litigation process, and to articulate with specificity the claims

12 and theory of a plaintiff's infringement claims." *InterTrust Techs. Corp. v. Microsoft Corp.*, No. C

13 01-1640 SBA, 2003 WL 23120174, at *2 (N.D. Cal. Dec. 1, 2003). Patent L.R. 3-1 is intended "to

14 require the party claiming infringement to crystallize its theories of the case early in the litigation and

15 to adhere to those theories once disclosed." *Bender v. Advanced Micro Devices, Inc.*, No. C-09-1149

16 MMC (EMC), 2010 WL 363341, at *1 (N.D. Cal. Feb. 1, 2010). In order to accomplish this goal,

17 Rule 3-1 requires infringement contentions that state "specifically where each limitation of each

18 asserted claim is found within each Accused Instrumentality[.]" Patent L.R. 3-1(c).

19 A plaintiff is not initially required to provide source code citations in its infringement

20 contentions before the plaintiff has had an opportunity to examine the code. *See Network Caching*

21 *Tech., LLC v. Novell, Inc.*, No. C–01–2079–VRW, 2002 WL 32126128, at *7 (N.D. Cal. Aug. 13,

22 2002). However, "[w]here the Accused Instrumentality includes computer software based upon

23 source code made available to the patentee, patentees must provide 'pinpoint citations' to the code

24 identifying the location of each limitation." *Genentech, Inc. v. The Trs. of the Univ. of Pa.*, Case No.

25 C 10-2037-LHK (PSG), 2010 U.S. Dist. LEXIS 142450, at *7 (N.D. Cal. Dec. 13, 2010) (citing *Big*

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27 [1] Pursuant to the Court's Order and Fed. R. Civ. P. 6(d), Proofpoint's deadline to renew its motion is today.

28

DEFENDANTS' RENEWED MOTION TO STRIKE INFRINGEMENT CONTENTIONS

1 *Baboon Corp. v. Dell, Inc.*, 723 F.Supp. 2d 1224, 1228 (C.D. Cal. 2010)); *see Vasudevan Software*

2 *Inc. v. IBM Corp.*, No. C09-05897 RS (HRL), 2011 WL 940263, at *7 (N.D. Cal. Feb. 18, 2011).

3 "[T]he authority is clear that a plaintiff should provide citations once a plaintiff has had a sufficient

4 opportunity to review the source code, at least with respect to contentions that are or may be based

5 upon it." *Vasudevan Software*, 2011 WL 940263, at *7.   Numerous courts in other districts

6 interpreting similar local rules are in agreement. *REC Software USA, Inc. v. Bamboo Solutions Corp.*,

7 No. C11–0554JLR, 2012 WL 3545056 at *3 (W.D. Wash. Aug. 16, 2012); *see Ameranth Inc. v. Pizza*

8 *Hut, Inc.*, No. 12cv729 JLS (NLS), 2013 WL 3894880, at *8-*9 (S.D. Cal. Jul. 26, 2013); *Michael S.*

9 *Sutton Ltd. v. Nokia Corp.*, No. 6:07CV203, 2009 WL 9051240, at *2 (E.D. Tex. Feb. 13, 2009).

10   Where a plaintiff's contentions are facially inadequate in failing to disclose a plaintiff's theory

11 of infringement, courts routinely strike the contentions. *See Theranos, Inc. v. Fuisz Pharma LLC*, No.

12 11-cv-05236-YGR, 2012 WL 6000798, at *6-*7 (N.D. Cal. Nov. 30, 2012) (striking contentions and

13 requiring plaintiff to file a motion for leave to amend in order to serve revised contentions). This is

14 particularly true where plaintiff is provided repeated opportunities to amend its contentions, yet fails

15 to do so. *Shared Memory Graphics LLC v. Apple Inc. ("Shared Memory Graphics II")*, No. C-10-

16 02475 MMC (JSC), 2011 WL 3878388, at *8 (N.D. Cal. Sept. 2, 2011) (striking plaintiff's second

17 amended infringement contentions without leave to amend); *Blue Spike, LLC v. Adobe Sys., Inc.*, No.

18 14-cv-01647-YGR (JSC), 2015 WL 335842, at *6-*8 (N.D. Cal. Jan. 26, 2015) (striking doctrine of

19 equivalents, indirect infringement, and willful infringement contentions given plaintiff's "failure to

20 take any action," despite defendants "having raised this defect in informal communications, a

21 discovery letter to the Court, and a formally noticed motion").

22 **IV.   ARGUMENT**

23   **A.   Finjan's Citations to Broad Source Code Directories Fail To Disclose Its
                     Infringement Theories on an Element-By-Element Basis**

24

25   Finjan's reliance on source code directories in support of its infringement contentions is

26 inadequate to disclose Finjan's theories of infringement for any claim limitation of any asserted

27 patent. Indeed, Finjan's repeated citations to high-level source code directories are precisely the

28 type of disclosures that the Court has previously rejected. In its prior order, the Court expressed

DEFENDANTS' RENEWED MOTION TO STRIKE INFRINGEMENT CONTENTIONS

1   concern that Finjan's contentions were "framed in high-level generalities that do not specifically

2   relate to the claim elements identified in each Claim." Dkt. No. 138 at 11. The Court explained

3   that under existing case law, the patentee "must map *specific* elements of Defendants' alleged

4   infringing products onto Plaintiff's claim construction." *Id.* (emphasis added) (quoting *Shared*

5   *Memory Graphics LLC v. Apple, Inc.*, 812 F.Supp.2d 1022, 1025 (N.D. Cal. 2010). The Court

6   further noted that "plaintiff bears the burden of providing infringement contentions that *specify* the

7   location of every claim element within the accused products." *Id.* (emphasis added) (quoting

8   *Bender v. Maxim Integrated Prods.*, No. C 09-01152 SI, 2010 WL 1135762, at *2 (N.D. Cal. Mar.

9   22, 2010)). Indeed, citing these same concerns, courts in this District have routinely required

10 patentees to provide "pinpoint citations" to source code. *Genentech,* 2010 U.S. Dist. LEXIS

11 142450, at *7; *Vasudevan Software* 2011 WL 940263, at *7; *see Digital Reg of Texas, LLC v.*

12 *Adobe Sys. Inc.*, No. CV 12-01971-CW (KAW), 2013 WL 3361241, at *4 (N.D. Cal. Jul. 3, 2013)

13 (compelling amendments to infringement contentions because patentee had access to source code

14 for approximately eight months, and therefore, "at this juncture, should be able to amend its ICs to

15 clearly articulate how each of [Defendant's] particular products infringe on Plaintiff's respective

16 patents").

17   Contrary to this Court's prior Order and the black letter law in this District, Finjan's amended

18 contentions fail to even identify specific source code *files* that allegedly infringe, let alone provide

19 pinpoint citations to the specific functions or lines of code within those files that it alleges practice the

20 claim limitations. Instead, Finjan relies exclusively on blanket string citations to multiple source code

21 *directories*, "invit[ing] Defendants and the Court merely to *assume* the presence of [the asserted

22 limitations]." *Shared Memory Graphics II*, 2011 WL 3878388, at *3, *6 (emphasis added) (striking

23 deficient contentions). These deficient source code citations fail to give Proofpoint notice of Finjan's

24 theories of infringement. For example, the '844 and '086 patents require a "Downloadable security

25 profile." Finjan repeatedly describes this profile as simply "a profile in memory," but fails to identify

26 what files, if any, are stored in memory by the accused products or the source code that corresponds to

27 the generation and/or storage of any such profiles in memory. *See, e.g.*, Stake Decl. ¶ 4, Ex.A-1 at 5-

28 16. Proofpoint is left with only Finjan's three-page list of source code directories to guess at what

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1 | Finjan might be pointing to as being the claimed Downloadable security profile. To give another

2 | example, the claims of the '822 and '633 patents require "mobile protection code." Finjan states,

3 | "The mobile protect [sic] code is instruction and other code sent to the virtual environments for

4 | monitoring the code." *See, e.g.*, Stake Decl. ¶ 8, Ex. B-1 at 12. Yet Finjan fails to identify what the

5 | alleged "instruction" or "other code" is that is allegedly "sent to the virtual environments," again

6 | leaving Proofpoint with nothing more than a laundry list of dozens of source code directories as

7 | alleged proof. *See id*. at 14-16.

8 | Moreover, Finjan's failure to provide sufficiently specific source code citations is endemic

9 | throughout its contentions, as Finjan has cited no more than the laundry list of source code directories

10 | for every asserted claim element. Indeed, each of the asserted patents involves numerous claim

11 | elements that can only be shown by a citation to source code—a fact that Finjan itself admitted during

12 | the hearing on the previous motion to strike. Stake Decl. ¶ 36, Ex. L at 4:2-4. Yet Finjan knowingly

13 | served infringement contention that fail to provide a theory of infringement based on this source code,

14 | forcing Proofpoint to renew its motion to strike. The following table lists just some of the asserted

15 | claim terms in each patent that implicate source code:

Patent	Asserted Claim Limitation
'844 (Appendix A)	"Downloadable security profile"
	"inspector"
	"linking by the inspector the first Downloadable security profile to the Downloadable before a web server makes the Downloadable available to web clients"
	"memory storing a first rule set"
	"content inspection engine for using the first rule set to generate a first Downloadable security profile"
	"Downloadable interceptor for receiving a downloadable"
	"file reader coupled to the interceptor for determining whether the Downloadable includes a linked Downloadable security profile"
	"an engine coupled to the file reader for determining whether to trust the Downloadable security profile"
	"A computer-readable storage medium storing program code"
'822 (Appendix B)	"information monitor for receiving downloadable-information"
	"content inspection engine . . . for determining whether the downloadable-information includes executable code"
	"mobile protection code"

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Patent	Asserted Claim Limitation
	"packaging engine . . . for causing mobile protection code ("MPC") to be communicated to at least one information-destination"
	"downloadable-information analyzers for analyzing the downloadable-information"
	"detection indicator indicating whether a downloadable-information characteristic corresponds with an executable code characteristic"
	"inspection controller . . . for determining whether the indicators indicate that the downloadable-information includes executable code"
	"MPC generator for providing the MPC"
	"linking engine . . . for forming sandbox package"
	"transfer engine for causing the sandbox package to be communicated to the at least one information destination"
	"forming a sandboxed package"
	"causing the sandboxed package to be delivered to the downloadable-information destination"
'918 (Appendix C)	"scanning CODE-A to derive a profile thereof"
	"determining, based on the derived profile of CODE-A, an appropriate computer account from among the plurality of computer accounts"
	"information about the determined computer account name"
	"executable wrapper code"
	"forwarding CODE-C to the client computer for processing"
	"computer-readable storage medium storing program code"
'633 (Appendix D)	"mobile protection code"
	"information monitor for receiving downloadable-information"
	"content inspection engine . . . for determining, by the computer, whether the downloadable-information includes executable code"
	"protection agent engine . . . for causing mobile protection code to be communicated . . . if the downloadable-information is determined to include executable code"
	"parser for parsing the downloadable information"
	"content analyzer . . . for determining whether one or more downloadable-information elements of the downloadable information correspond with executable code elements"
	"distinct software modules comprise an information re-communicator and a mobile code executor"
	"receiving . . . downloadable-information including executable code"
	"causing mobile protection code to be executed by the mobile code executor at a downloadable information destination"
	"one or more operations of the executable code at the destination, if attempted, will be processed by the mobile protection code"
'305 (Appendix E)	"receiving . . . incoming content from the Internet on its destination to

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Patent	Asserted Claim Limitation
	an Internet application"
	"a database of parser and analyzer rules"
	"patterns of types of tokens"
	"tokens comprising a punctuation type, an identifier type and a function type"
	"rule-based content scanner . . . for scanning incoming content . . . to recognize the presence of potential computer exploits therewithin"
	"network traffic probe . . . for selectively diverting incoming content from its intended destination to said rule-based content scanner"
	"rule update manager . . . for updating said database of parser and analyzer rules periodically"
'086 (Appendix F)	"security profile data"
	"representation of the Downloadable security profile data"
	"appending a representation of the Downloadable security profile data to the Downloadable"
	"appended Downloadable"
	"database manager for retrieving security profile data for the incoming Downloadable from a database of Downloadable security profiles indexed according to Downloadable IDs"
'154 (Appendix G)	"invoking a second function with the input, only if a security computer indicates that such invocation is safe"
	"transmitting the input to the security computer for inspection, when the first function is invoked"
	"receiving an indicator from the security computer when it is safe to invoke the second function with the input"
	"suspends processing of the content after said transmitter transmits the input to the security computer"
	"calling a second function with a modified input variable"
	"the modified input variable is obtained by modifying the input variable if the security computer determines that calling a function with the input variable may not be safe"
'408 (Appendix H)	"multi-lingual language detector . . . for determining any specific one of a plurality of programming languages in which the incoming stream is written"
	"scanner instantiator . . . for instantiating a scanner for the specific programming language"
	"rules accessor for accessing parser rules and analyzer rules for the specific programming language"
	"parser rules and analyzer rules"
	"define certain patterns in terms of tokens"
	"lexical constructs for the specific programming language"
	"tokenizer, for identifying individual tokens within the incoming

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Patent	Asserted Claim Limitation
	stream"
	"parser, for dynamically building . . . a parse tree . . . in accordance with the parser rules"
	"analyzer, for dynamically detecting . . . combinations of nodes in the parse tree which are indicators of potential exploits, based on the analyzer rules"
	"a parse tree whose nodes represent tokens and rules vis-à-vis the specific programming language"

Specific citation to source code is vital to a clear articulation of Finjan's infringement theories for at least each of these terms, and Finjan's failure to do so violates Patent Local Rule 3-1. *Vasudevan Software*, 2011 WL 940263, at *8 (compelling pinpoint citations to source code); *see Ameranth*, 2013 WL 3894880, at *8-*9 (compelling disclosure of source code that meets five asserted claim limitations).

Ultimately, Finjan's citations to high-level source code directories gives the appearance of complying with the Court's order and the Local Rules without actually providing any discernible theories of infringement. In doing so, Finjan attempts to maintain complete discretion to later decide what source code within each of the accused instrumentalities meets each limitation.[2] This is impermissible, as courts have recognized that allowing a patentee to add source code citations later could result in infringement theories that "differ ***substantially***" from its infringement contentions. *Townshend Intellectual Prop., L.L.C. v. Broadcom Corp.*, Case No. 06-cv-05118 JF (RS), 2007 WL 1994158, at *3 (N.D. Cal. 2007) (emphasis original) (rejecting patentee's attempts to delay providing specific citations to allegedly infringing source code); *cf. Network Caching Tech., LLC*, 2002 WL 32126128, at *5 (emphasis added) (requiring under the Local Rules that a "plaintiff compare an accused product to its patents on a claim by claim, element by element basis ... *reverse engineering or its equivalent* are required"). Here, Finjan has had full access to Proofpoint's source code for nearly a year, yet has still failed to present its theory of infringement

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[2]   Finjan tellingly delayed its inspection of Proofpoint's source code until today, May 18, 2015, the last day that Proofpoint could renew its motion to strike. Finjan has thus made clear its intent, despite its representations to the Court to the contrary, to use broad source code citations in its infringement contentions as a mere placeholder.

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1   with specificity. While this requires some effort by a patentee, "[t]he purpose of Patent Local

2   Rule 3-1, however, is in fact to be nit picky, to require a plaintiff to crystallize its theory of the

3   case and patent claims." *InterTrust Tech. Corp.*, 2003 WL 23120174, at *3. Finjan instead has

4   made no effort to inspect Proofpoint's source code, even in the five weeks between the hearing on

5   Proofpoint's motion to strike and Finjan's service of amended infringement contentions.

6   Finjan fails to provide the source code citations necessary to identify "specifically where

7   each limitation of each asserted claim is found within each Accused Instrumentality[.]" Patent

8   L.R. 3-1(c). As a result, Finjan's contentions fall far well short of crystallizing its theory of

9   infringement.

10   **B.   Finjan Cannot Excuse Its Failure To Review Proofpoint's Source Code**

11   This is not a situation where Finjan's preparation of infringement contentions has been

12   "restricted by defendants' sole possession of the information plaintiffs need." *France Telecom,*

13   *S.A. v. Marvell Semiconductor, Inc.,* No. 12–cv–04967 WHA (NC), 2013 WL 1878912, at*4

14   (N.D. Cal. May 3, 2013) (quoting another source). Proofpoint has made its source code available

15   to Finjan for nearly a year, yet Finjan admits in its amended infringement contentions that it has

16   only performed "limited review the . . . of source code." *See* Stake Decl. ¶ 6, Ex. A-3 at 5. In

17   particular, over the eleven months before serving its amended contentions, Finjan only inspected

18   the code a total of 4 days, all in October 2014. Stake Decl. ¶ 35, Ex. K. Thus, Proofpoint's source

19   code remained unexamined despite two Court orders compelling disclosure of Finjan's

20   infringement theories. *See id.* Finjan only returned to inspect the source code today, three weeks

21   after serving amended infringement contentions. Such dilatory behavior is indefensible. *See Sun*

22   *Microsystems, Inc. v. Network Appliance, Inc.*, No. C-07-05488 EDL, 2009 WL 508448, at *1-*2

23   (N.D. Cal. Feb. 27, 2009) (denying amendments to infringement contentions when patentee had

24   access to source code for approximately nine months); *Apple Inc. v. Samsung Elecs. Co.*, No. 12–

25   CV–0630–LHK (PSG), 2013 WL 3246094, at *12 (N.D. Cal. June 26, 2013) (permitting source

26   code amendments for code obtained within the last four months, but no earlier). "The bottom line

27   is that, after a plaintiff-patentee has had a reasonable opportunity to review the source code for the

28   defendant's accused software product, the patentee's time for trolling the proverbial waters for a

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1   theory of infringement comes to an end[.]" *Diagnostic Sys. Corp. v. Symantec Corp.*, No. SACV

2   06-1211 DOC (ANx), 2009 WL 1607717, at *5 (C.D. Cal. Jun. 5 2009).

3   Finjan has been given more than enough time to identify the specific source code it alleges

4   infringes the asserted patents, and its failure to do so is inexcusable.

5   **C.   The Court Should Strike Finjan's Reliance on Source Code Evidence**

6   Throughout this case, Finjan has been given numerous opportunities to supplement its

7   infringement contentions, including multiple invitations to do so in correspondence from Proofpoint

8   (*See* Dkt. No. 118 at 5), in response to Proofpoint's interrogatory (*See* Dkt. No. 115), and when

9   ordered to do so by this Court (Dkt. No. 138). Finjan admitted in open court that an adequate

10 disclosure of infringement theories for its patents would require citation to Proofpoint's source code.

11 Stake Decl. ¶ 36, Ex. L at 4:2-4. Yet, in the face of a court order compelling specific infringement

12 contentions, Finjan failed to cite to even a single file or function within the accused products. Finjan

13 instead cited to dozens of source code directories, with the clear intention to further shift its

14 infringement theories only after serving its contentions. Proofpoint's ability to prepare a defense to

15 Finjan's claims of infringement has already been severely prejudiced by being repeatedly denied an

16 explanation of Finjan's allegations. At this juncture, permitting Finjan any further amendment to its

17 infringement contentions would again reward Finjan for its continued delay and lack of diligence, and

18 vitiate the requirement that a plaintiff crystallize its theory of infringement at an early stage.

19   Accordingly, Proofpoint asks the Court to strike Finjan's citations to source code with

20 prejudice. Such relief is appropriate where a patentee is afforded repeated opportunities to amend its

21 contentions, yet fails to do so. *Shared Memory Graphics II*, 2011 WL 3878388, at *8 (striking

22 plaintiff's second amended infringement contentions for failing to disclose a "data distribution bus" as

23 required by the claims). Here, despite the Court's order compelling adequate infringement

24 contentions, Finjan still fails to disclose a theory explaining how any of the accused source code

25 allegedly meets the asserted claims. Finjan's failure warrants a preclusive sanction from this Court.

26 In the alternative, Finjan should not be permitted to provide any additional amendments to its

27 infringement contentions, and should be precluded from identifying specific source code citations

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1   within the source code directories that infringe. Finjan cannot be granted carte blanche to provide

2   untimely disclosures of specific source code based solely on its identification of high-level directories.

3   **V.   CONCLUSION**

4   For the foregoing reasons, Proofpoint respectfully requests that the Court strike Finjan's

5   infringement contentions with respect to the citations to Proofpoint's source code with prejudice

6   or, in the alternative, preclude Finjan from relying on specific source code evidence to support its

7   allegations of patent infringement.

8

9   DATED: May 18, 2015   Respectfully submitted,
                                            QUINN EMANUEL URQUHART &
10   SULLIVAN, LLP

11   By   */s/ Jennifer A. Kash*
12   Jennifer A. Kash
                                                    Sean Pak
13   Iman Lordgooei
                                                    Sam Stake
14
                                                    Attorneys for Defendants PROOFPOINT, INC.
15   and ARMORIZE TECHNOLOGIES, INC.

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